

# Same-sex marriage: a defense based on foundations of natural law

CASAMENTO ENTRE PESSOAS DE MESMO SEXO: UMA DEFESA A PARTIR DOS FUNDAMENTOS DO DIREITO NATURAL

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## Abstract

Laymen in general associate natural law theories to conservative moral conceptions, like traditional marriage of a man and a woman. That makes sense when we notice Catholic Church's position about matrimony or even academic marriage conceptions as the one claimed by John Finnis. But would be possible to defend the so called "marriage equality" in natural law grounds? This paper aims to answer this question affirmatively. Departing from a critical analysis of Finnis' natural law theory and his marriage conception, I argue that a better matrimony conception needs to be grounded on a wide vision of human sexuality, which encompasses lesbian and gay couples. Instead of procreation (which is one of the marriage points in Finnis' conception), human experience shows that sex is not limited to breeding – it is a way people can achieve pleasure and high levels of intimacy, regardless their sexual orientation. I conclude that this way of conceptualizing human sexuality is "far more evident" than the one suggested by Finnis and is also consistent with Germain Grisez's interpretation of Aquinas' first principle of practical reason – with which Finnis himself agrees.

## Keywords

Same-sex marriage; concept of marriage; natural law; practical reason; John Finnis.

## Resumo

Pessoas leigas costumam associar teorias de Direito Natural às concepções morais consideradas "conservadoras" – como a ideia de que o casamento só existe entre "um homem e uma mulher". Esta associação faz sentido quando analisamos a posição da Igreja Católica sobre o tema, bem como concepções de casamento defendidas por autores jusnaturalistas, como é o caso de John Finnis. Mas é possível defender o casamento entre duas mulheres ou dois homens levando em consideração os fundamentos do Direito Natural? Neste artigo, defendo que sim. Partindo de uma análise crítica da teoria jusnaturalista de Finnis e de sua concepção de casamento, argumento que uma concepção mais adequada do matrimônio deve levar em consideração a amplitude da sexualidade humana, de modo a abranger também casais de lésbicas e gays. Sustento que a forma como experienciamos nossa sexualidade não está limitada à procriação, como sugere Finnis ao elencá-la como um dos propósitos do casamento. Ao contrário, sugiro que pessoas se envolvem e se relacionam sexualmente, independentemente de orientação sexual, tendo em vista propósitos tão variados como o prazer e/ou o aumento dos laços de intimidade. Concluo que, uma vez corrigidos os equívocos interpretativos e factuais de Finnis, o casamento entre pessoas de mesmo sexo pode ser defendido à luz dos fundamentos do Direito Natural, sendo plenamente consistente com a interpretação de Germain Grisez sobre o primeiro princípio de razão prática de Tomás de Aquino – interpretação que o próprio Finnis considera correta.

## Palavras-chave

Casamento entre pessoas do mesmo sexo; conceito de casamento; Direito Natural; razão prática; John Finnis.

## INTRODUCTION

Most people associate the so called “new natural law” to conservative perceptions, and that makes sense when we speak about sexual morality. Authors like John Finnis, Germain Grisez, and Robert George have been considered by their critics as major exponents of this line of thought, which believe homosexuality as being something immoral and stands against same-sex marriage.<sup>1</sup> But the fact is that the very structure assigned to the most basic principles of natural law may lead us to understand questions about sexual morality in a distinct way – thus it is possible to assume a more progressive agenda and argue for same-sex marriage from the foundational principles of natural law point of view.

My intention with this article is to present a new way of understanding human sexuality on the grounds of natural law by criticizing John Finnis’ conception of marriage. This is similar to answering the provocation formulated by Nicholas Bamforth and David Richards in their book *Patriarchal Religion, Sexuality, and Gender* (2007). Bamforth and Richards read Finnis’ arguments as ultimately religious, considering the influence exerted through his texts by Germain Grisez, an intellectual connected to the Catholic Church. For them, “rescue” natural law from religion and at the same time defend the morality of sex acts outside marriage would involve such a significant revision of natural law – something like the invention of a new theory.<sup>2</sup>

However, as this article shows, the connection between Finnis and the Catholic Church does not imply that Finnis’ arguments are necessarily religious in type. Even a quick reading on Finnis’ *Natural Law and Natural Rights* (2011d) is sufficient to demonstrate how natural law can be exposed on secular terms. Finnis has also a clear concern in stating his position

- 1 Stephen Macedo highlights natural law’s “long tradition” in theorizations about sexual morality. In his article “Homosexuality and the Conservative Mind,” Macedo says: “if an account of the immorality of homosexual acts as such is to be found, one might reasonably expect to find it articulated by those who carry on the long tradition of natural law theorizing about sexual morality” (MACEDO, 1995, p. 6). Similar position is taken in consideration by Andrew Koppelman in his text “Is Marriage Inherently Heterosexual?": “This paper will examine the most sophisticated version of the claim that marriage is necessarily heterosexual, that developed by the ‘new natural law theorists,’ Germain Grisez, John Finnis, Gerard V. Bradley, and Robert P. George. As Stephen Macedo has observed, the argument developed by these writers ‘is by far the most elaborate intellectual case for distinguishing between homosexual and heterosexual activity’” (KOPPELMAN, 1997, p. 2).
- 2 “[...] we argue that in so far as the new natural lawyers seek to present their arguments of being of a secular nature, they must fail – given the religious categorization – for internal inconsistency. A question which this leaves hanging is whether it is possible to rescue parts of new natural law from this categorization. While we do not offer a conclusive answer, we suggest that a rescue attempt might entail such heavy revision of those parts that it would be akin to inventing a new theory” (BAMFORTH; RICHARDS, 2007, p. 94).

about sexual morality (the “standard modern position”) without addressing to religious, theological, and sectarian beliefs (FINNIS, 2011b, p. 336).<sup>3</sup>

Starting from the first principles taken by natural lawyers on their theories, this article advances relevant arguments supporting same-sex marriage. The critiques against Finnis’ conception of marriage presented here are not only external but *internal* critiques. This means an important contribution to the political debate on family and marriage legal constitution: after all, this article speaks the same language as its opponents, increasing their argumentative burden. Natural lawyers are required to demonstrate why the present proposed interpretation of natural law foundations would be wrong before advancing any argument against same-sex marriage. Therefore, I am not “inventing a new theory” but only proposing a new way to argue for same-sex marriage on natural law grounds.

It is worth noting that debates about same-sex marriage are not over yet. At least in Brazil, even after the judicial recognition of lesbian and gay families by the Supreme Court<sup>4</sup> and the National Council of Justice,<sup>5</sup> Congressmen keep discussing bills against gay marriage.<sup>6</sup> In Santa Catarina State, public prosecutor Henrique Limongi is known for denying lesbian and gay couples marriage licenses, demanding the judicial nullification of already celebrated marriages.<sup>7</sup> The public debate on same-sex marriage remains current and relevant.<sup>8</sup>

This paper is organized in three parts. First, I introduce the way Finnis understands natural law and its basic principles, as well as his conception of marriage as a human basic good – an exclusive and permanent union between a man and a woman. The second part regards criticisms on Finnis’ marriage conception, highlighting Stephen Macedo’s and Andrew Koppelman’s

<sup>3</sup> “The standard modern position involves a number of explicit or implicit judgments about the proper role of law and the compelling interests of political communities, and about the evil of homosexual conduct. Can these be defended by reflective, critical, publicly intelligible, and rational arguments? I believe they can. The judgment that it is morally wrong need not be a manifestation either of mere hostility to a hated minority, or of purely religious, theological, and sectarian belief” (FINNIS, 2011b, p. 336).

<sup>4</sup> ADI n. 4277 and ADPF n. 132, judged on May 2011.

<sup>5</sup> Resolution n. 175, published in May 2013.

<sup>6</sup> The “Family Statute” (Bill n. 6583/2013) is a clear example. Proposed by deputy Anderson Ferreira (PR/PE), this bill rules out lesbian and gay couples from the legal definition of family.

<sup>7</sup> As reported by Brazilian newspaper *O Globo*. Retrieved June 22, 2018, from *O Globo* website: <<https://g1.globo.com/sc/santa-catarina/noticia/promotor-tenta-anular-casamento-civil-entre-engenheira-e-medica-de-sc.ghtml>>.

<sup>8</sup> The same occurs in other parts of the world. On February 2018, few months after recognizing lesbian and gay marriages, the British Overseas Territory of Bermuda became the first jurisdiction to legalize and then repeal same-sex marriages, as reported by *The New York Times*. Retrieved June 22, 2018, from *The New York Times* website: <<https://www.nytimes.com/2018/02/08/world/americas/bermuda-gay-marriage.html>>.

contributions. Starting from Germain Grisez's interpretation on Aquinas' first principle of practical reason, I suggest a different conception of human sexuality. I also propose that marriage should be detached from parenthood: parent-child relation is independent of parent's marital relation. As a conclusion, I argue for the reformulation of Finnis' substantive position regarding the relations between government and homosexuality, considering the reinterpretation of the most basic presuppositions of natural law suggested on this paper. Based on Finnis' conception of political common good, I claim government ought to recognize same-sex marriages.

## I NATURAL LAW AND MARRIAGE IN FINNIS' THEORY

As jurist and philosopher, John Finnis embrace the "analytical theory of natural law" and one of his main concerns is to demystify the way many authors present natural law theorization.<sup>9</sup> In his most known book, *Natural Law and Natural Rights* (FINNIS, 2011d), Finnis analyzes juridical and moral phenomena without resorting to metaphysics. Finnis' starting point is his comprehension of the "principles of natural law," where stand the so called basic human goods and basic requirements of practical reasonableness. Thereby the influence of Aristotle and Thomas Aquinas in Finnis thought is clear – but without losing the analytical style of Herbert Hart, his preceptor in Oxford.

It does not mean, however, that we must address directly to Aristotle or Aquinas to criticize Finnis' positions – and this is a very important point considering the aforementioned criticism of Bamforth and Richards. Even though some elements of Finnis' theory and marriage conception are based on his interpretation about thoughts of those classical authors, Finnis' moral and philosophical arguments must hold by their own reasonableness.<sup>10</sup> At this

9 "Every author has his milieu: this book has roots in a modern tradition that can be labelled 'analytical jurisprudence', and my own interest in that tradition antedates the time when I first began to suspect that there might be more to theories of natural law than superstition and darkness. Someone who shared my theory of natural law, but whose focus of interest and competence was, say, sociological jurisprudence or political theory or moral theology, would have written a different book" (FINNIS, 2011d, p. vi).

10 "[...] it may be as well to point out that in this book nothing is asserted or defended by appeal to the authority of any person or body. I do quite frequently refer to Thomas Aquinas, because on any view he occupies a uniquely strategic place in the history of natural law theorizing. Likewise, I refer occasionally to the Roman Catholic Church's pronouncements on natural law, because that body is perhaps unique in the modern world in claiming to be an authoritative exponent of natural law. But, while there is place for appeal to, and deference to, authority, that place is not in philosophical argument about the merits of theories or the right response to practical problems, and so is not in this book. My arguments, then, stand or fall by their own reasonableness or otherwise" (FINNIS, 2011d, p. vi).



point, the main problem is not whether Finnis' position is "conservative" or "religious," but whether his theory is sound or not.<sup>11</sup>

### 1.1 PRINCIPLES OF NATURAL LAW

In the character of a *theory* about natural law, Finnis' theory starting point is what he defines as *the principles of natural law*. They are

(i) a set of basic practical principles which indicate the basic forms of human flourishing as goods to be pursued and realized, and which are in one way or another used by everyone who considers what to do, however unsound his conclusions; and (ii) a set of basic methodological requirements of practical reasonableness (itself one of the basic forms of human flourishing) which distinguish sound from unsound practical thinking and which, when all brought to bear, provide the criteria for distinguishing between acts that (always or in particular circumstances) are reasonable-all-things-considered (and not merely relative-to-a-particular purpose) and facts that are unreasonable-all-things-considered, i.e. between ways of acting that are morally right or morally wrong – thus enabling one to formulate (iii) a set of general moral standards. (FINNIS, 2011d, p. 23)

These principles of natural law are considered *self-evident* as some principles of logic. According to Finnis' interpretation of Aquinas, the self-evidence of the principles of natural law are analogous to the self-evidence of basic principles of practical reasonableness – like the proposition that "a human being is a rational being" (FINNIS, 2011d, p. 32). These principles are also indemonstrable, undemonstrated, and incommensurable.

But how could we grasp these principles of natural law? On Finnis' thought, the practical reasoning guided to basic human goods cannot be understood in an external way – by psychological, anthropological and metaphysical observation. It can be said that the practical reasoning must be "internally" comprehended, to the extent that we can *experience* our own nature and be conscious about our inclinations – what does not mean an inference process (FINNIS, 2011d, p. 34).

Therefore, Finnis' theorization gives special attention to human reason. Reason directed to a purpose is *practical reason*. And we can find in practical reason not only our ability to

11 As Finnis argues in his article *Limited Government*: "It is, I think, a mistake of method to frame one's political theory in terms of its 'liberal' or 'non-liberal' (or '[anti-]conservative' or '[non-]socialist' or '[anti-]capitalist') character. Fruitful inquiry in political theory asks and debates whether specified principles, norms, institutions, laws, and practices are 'sound', 'true', 'good', 'reasonable', 'decent', 'just', 'fair', 'compatible with proper freedom', and the like – not whether they are liberal or incompatible with 'liberalism'" (FINNIS, 2011c, p. 94).

formulate reasons that explain the judgment about what is desirable or not, but also our capacity to act based on these very reasons – in pursuit of what is considered good and valuable (FINNIS, 2011a, p. 1). From practical reason, we can delimit what is relevant for our lives and for common life. The reasons for action that we found through practical reason are called *basic values* or *basic human goods* (FINNIS, 2011d, p. 59).<sup>12</sup>

The human goods are considered basics in three fundamental dimensions. First, each one is equally a self-evident good. Second, a basic human good cannot be reduced to an aspect of another good. Third, each one can be reasonably considered the most important one when subject to our attention – what does not mean hierarchy between them, for basic human goods are incommensurable.<sup>13</sup>

But we need more elements to answer the key question in morality: what should be done? From which goods must we participate, and how can we establish our order of priorities?

To answer these questions, Finnis turns to the sole basic human good that can never be turned down, the one that we participate when deliberating about other basic goods – the *practical reasonableness* (FINNIS, 2011d, p. 100). The practical reasonableness exerts a prevailing role in Finnis' theory, concerning the human ability to use intelligence to solve practical problems. It also relates to our character and the way of life that we must cultivate (FINNIS, 2011d, p. 88). The practical reasonableness is composed by several requirements, operating the transition from basic human goods (as pre-moral values) to what is called “morality” – the decision-making about projects and actions assessed in terms of right or wrong. Thus, the practical reasonableness is a complex value which involves freedom and reason, integrity and authenticity.<sup>14</sup>

Among the requirements of practical requirement, the seventh one is essential for this paper: we must *respect every basic value in every action*. For sure, life contingencies imply the recognition of our liberty and self-determination – we can see the participation in some

12 Finnis' list of basic human goods is variable in his work. A summary of his position can be found in the postscript on the second edition of *Natural Law and Natural Rights*. They are: knowledge, skillful performance, bodily life, friendship, marriage, practical reasonableness, and harmony with ultimate source (FINNIS, 2011d, p. 448).

13 Considering that one's self-realization is inexhaustible, it is better to say that one *participates* in basic values. Pursuit and realization are misleading expressions in this context (FINNIS, 2011d, p. 96).

14 In the same way as human goods, the requirements of practical reasonableness are self-evident, indemonstrable, undemonstrated and incommensurable principles of natural law. They are presented in the fifth chapter of *Natural Law and Natural Rights* (FINNIS, 2011d, p. 103-126), consisting in: (1) a coherent plan of life; (2) no arbitrary preferences amongst values; (3) no arbitrary preferences amongst persons; (4) detachment; (5) commitment; (6) efficiency within reason; (7) respect for every basic value in every act; (8) the requirements of common good; (9) following one's conscience.

goods as more important than others (as a scientist who can be concerned with the good of knowledge but does not care about making significant friendships). What is relevant for this seventh requirement is that basic human goods should not be subordinated to any project or personal commitment or sentiments or cost-benefit considerations – for this will correspond to treat these basic goods in a commensurable way (FINNIS, 2011d, p. 121-122). This point is particularly important. As explained below, Finnis regards homosexual acts as contrary to the basic human good of marriage. Non-marital sex is considered an “instrumentalization” of our bodies and incompatible with human dignity – affronting the good of marriage and the seventh requirement of practical reasonableness.

## 1.2 MARRIAGE AS A BASIC HUMAN GOOD

As mentioned, John Finnis considers marriage a basic human good that we can participate and must valorize. A good account of Finnis’ position can be found in his essay *Marriage: a Basic and Exigent Good* (FINNIS, 2011e). There, Finnis delimits the *focal meaning* or *point* of marriage.

Marriage’s point is twofold: *procreation* (or parental care) and *friendship between spouses*. These characteristics are united in a special manner, in a way that marriage can be considered a human good so basic and constitutive of human fulfillment that can be said to be of intrinsic value (FINNIS, 2011e, p. 318). Furthermore, these points demonstrate marriage goes far beyond its legal dimension.

The procreation act does not forcefully depend on generating children, as they do not constitute an inexorable consequence of marriage. Reproduction is viewed by Finnis as a *function* that operates through the union between the reproductive organs of a man and a woman, uniting them biologically. This biological reality is not a simple “instrument” – it is part of everyone’s *personal* reality, as Finnis argues in his essay *Law, Morality, and ‘Sexual Orientation’* (2011b, p. 340). Therefore, the fundamental question is not related to offspring generation but to *reproductive sort of acts* – which Finnis calls the *biological union*:

Biological union between humans is the inseminatory union of male genital organ with female genital organ; in most circumstances it does not result in generation, but it is the behaviour that unites biologically because it is the behaviour which, as behaviour, is suitable for generation. (FINNIS, 2011b, p. 340)<sup>15</sup>

<sup>15</sup> But biological union is not the simple union between penis and vagina. Biological union is also a consensual and intentional union of genitals: “The organic unity which is instantiated in an act of the reproductive kind is not so much the unity of penis and vagina (as my inexact wording in essay 21 n. 14, first part of last sentence, incautiously suggests) but rather the unity of the man and the woman – the unity which is consummated in their intentional, consensual act of uniting those genital organs in seminal emission/reception in the woman’s reproductive tract” (FINNIS, 2011f, p. 382).

Therefore, biological union can only take place through the union between a man and a woman. Sterile or not, their genital organs are nonetheless reproductive organs. Spouses can “actualize” and “experience” the good of marriage only by this kind of sexual relation, which remains for sterile couples but not for the homosexual ones.

Sex could give mutual pleasure, but when it does not correspond to biological union it is regarded by Finnis as the instrumentalization of people – who, in Finnis’ words (1993, p. 12), “disintegrate themselves”. Thus, homosexual acts could be similarly criticized as copulation between humans and animals: they are dissociated from the expression of an intelligible common good, treating the human bodily life as merely animal (FINNIS, 2011b, p. 343). So marital sex, by definition, can be the only rational use of man and woman’s reproductive organs – and as reproductive organs, can only perform their *function* when united. Homosexual sex acts are for this reason deemed as the instrumentalization of individuals involved in them (as well as heterosexual sex acts which do not correspond to biological union – e.g. oral sex). Even if these sex acts were mutually delightful, they are incompatible with the very idea of marriage.

At this point, we must recall the seventh requirement of practical reasonableness, that each human good must be respected in all our actions. For Finnis believes that non-marital sex acts (i.e. sex acts distinct from the biological union) are an opposite and disrespectful choice to the good of marriage. So, individuals who have a homosexual inclination should remain with no active sexual life. Otherwise they would be confronting the good of marriage and acting immorally.<sup>16</sup>

In addition to the biological union, the other marriage’s point substantiates a special link between spouses, in an affective, emotional way. This link is not a pure and simple friendship but a kind of relationship where spouses passionately participate, oriented towards the practice of reproductive sex acts. This marital friendship matches what Aquinas conceived as *fides*, as interpreted by Finnis. *Fides* does not only involves abstaining from extramarital affairs (i.e. adultery), but is a reason for action (FINNIS, 2011e, p. 321). It is the willingness and commitment of each spouse to cleave (*accedere*) to the other and no other person, in a bodily and spiritually way – what constitutes a “positive fides” (the mutual support and sharing of a common life in a home) (FINNIS, 2011f, p. 362).

But Finnis argues the commitment and marital exclusiveness are particularly hard to keep among gay couples, precisely because same-sex partners are unable of reproductive acts. Thus,

16 “One who reasonably chooses a worthwhile form of life which entails responsibilities incompatible with the commitment and responsibilities of marriage does not thereby choose against the good of marriage, unless he or she engages in sex acts (in which case the choice to engage in them is against that good for the reason already stated: briefly, judging it reasonable to engage in sex acts non-maritally entails judging that the sex acts of a married couple do not really actualize, express and enable them to experience their marriage)” (FINNIS, 2011e, p 323).



Finnis raises not only philosophical but also empirical arguments which would render implausible the defense of same-sex marriage.<sup>17</sup>

In short, Finnis conceives only the unity of a man and a woman as genuine marital union. The sex act, as the biological union, is only reasonable and moral when addressed to participation in the good of marriage. Therefore, protecting heterosexual marriage is a moral requirement. The “simulation” of this union by same-sex partners is an illusory performance and is disrespectful to the good of marriage – thus being an offence to the seventh requirement of practical reasonableness.<sup>18</sup>

## 2 HOW TO CRITICIZE JOHN FINNIS

Finnis’ marriage conception (as the ones proposed by Germain Grisez and Robert George) is subject to constant criticism by authors who have a “liberal” perspective. However, I argue some of these criticisms are innocuous, for they cannot fully understand what Finnis conceives as a “basic human good”. Ultimately, Finnis’ position is shielded to external criticism. Only when we criticize Finnis’ understanding that marriage is a *basic good* we will be able to deconstruct his reasoning and to show his dogmatism and empirical misconceptions.

- 17 “Only a small proportion of men who live as ‘gays’ seriously attempt anything even resembling marriage as a permanent commitment. Only a tiny proportion seriously attempt marital fidelity, the commitment to exclusiveness; the proportion who find that the attempt makes sense, in view of the other aspects of their ‘gay identity’, is even tinier. Thus, even at the level of behaviour – i.e. even leaving aside its inherent sterility – gay ‘marriage’, precisely because it excludes or makes no sense of a commitment utterly central to marriage, is a sham [...] [S]ame sex partner cannot engage in acts of the reproductive kind, i.e. in marital sexual intercourse. For them the permanent, exclusive commitment of marriage – in which bodily union in such acts is the biological actuation of the multi-level (bodily, emotional, intellectual, and volitional) marital relationship – is inexplicable. Of course, two, three, four, five or any number of persons of the same sex can band together to raise a child or children. That may, in some circumstances, be a praiseworthy commitment. It has nothing to do with marriage” (FINNIS, 2011f, p. 384; 386).
- 18 As Finnis summarizes: “[...] the artificially delimited (two-person, lifelong...) category named ‘gay marriage’ or ‘same-sex marriage’ corresponds to no intrinsic reason or set of reasons at all. It has few presentable counterparts in the real world outside the artifice of debate. Marriage, on the other hand, is the category of relationships, activities, satisfactions, and responsibilities which can be intelligently and reasonably chosen by a man and a woman, and adopted as their integral commitment, because the components of the category respond and correspond coherently to a complex of interlocking, complementary good reasons: the good of marriage. True and valid sexual morality is nothing more, and nothing less, than an unfolding of what is involved in understanding, promoting, and respecting that basic human good, and of the conditions for instantiating it in a real, non-illusory way – in the marital act” (FINNIS, 2011b, p. 351).

## 2.1 MACEDO AND KOPPELMAN'S CRITICISMS

Stephen Macedo was concerned with criticizing Finnis and other natural law thinkers' position. In his paper "Homosexuality and the Conservative Mind" (MACEDO, 1995), Macedo claims Finnis' idea of biological union is an opportunistic one: its unique rationale is enabling sterile heterosexuals to marry, excluding homosexuals from matrimony (MACEDO, 1995, p. 10). For Macedo, the very idea of biological union would only make sense if reproduction could actually happen – but this is not the case of infertile heterosexual couples. So Finnis' conception of biological union is like pointing a gun at someone and pull the trigger, as Andrew Koppelman has suggested. As behavior, it is suitable for murder – but not when the gun is unloaded (MACEDO, 1995, p. 10; KOPPELMAN, 2004, p. 21).<sup>19</sup>

I think, however, that this criticism does not directly affect Finnis' conception of marriage. We must remind that marriage is a basic human good just because its twofold point is a *basic good* on rational human action, in evident and indemonstrable ways. Thus, the biological union is a self-evident good in human action as well. As behavior, it is necessary to procreate even if procreation does not occur by reasons adverse to personal wishes. Two men or two women cannot unite biologically, but a man and a woman can. As result a sterile couple can marry, while this union does not correspond to marriage's focal meaning but a peripheral or secondary case. At last, a gun is nonetheless a gun – and therefore designed to kill. It does not matter if it is loaded or not.

Thereby, I think Finnis and other natural law authors are not incoherent when they argue infertile heterosexual couples can marry. The idea of biological union prevents, at least formally, the analogy between sterility and homosexuality.<sup>20</sup> But other problems can arise. For

19 In Koppelman words: "Finnis recognizes that not every ejaculation of normal male genitalia will successfully lead to conception, and perhaps this is meant to minimize the difference between the organs of normal and infertile males. [...] But whether such behavior 'is suitable for generation' depends on whether the organs are in fact suitable for generation. A sterile person's genitals are no more suitable for generation than a gun with a broken firing pin is suitable for shooting. The gun's pin might be repairable, perhaps not; perhaps medicine can in some cases cure infertility. It is, however, a conceptual stretch to insist that the sexual acts of the incurably infertile are of the same kind as the sexual acts of fertile organs that occasionally fail to deliver the goods" (KOPPELMAN, 2004, p. 21).

20 These questions about sterility and homosexuality are well summarized by Patrick Lee and Robert George in their book *Conjugal Union: What Marriage Is and Why It Matters* (2014): "However, there is a clear difference between sodomy and marital coitus, even where the coitus cannot result in conception. No one could have children by performing sodomitical acts. Yet, this is not true of the kind of act performed by sterile married couples when they engage in coitus. A man and woman who are not temporarily or permanently infertile could procreate by doing exactly what the infertile married couple do when they consummate or actualize their marital communion. The behavior is identical and the intention – the actualization of marriage considered as a multileveled union founded upon organic bodily union – can be

example, Stephen Macedo shows concern about issues involving the hypothetical case of a “gay man” that goes through surgery to remove his penis and put a vagina (MACEDO, 1995, p. 10).<sup>21</sup> Of course, there is no need of hypothetical thought in that matter: in real world, there are hundred cases of transsexual people who go through sex reassignment surgery.

These questions emphasize Koppelman’s criticism about the *essentialism* in the way Finnis and other natural lawyers conceive the reproductive function of sex organs. And the reproductive function is no longer relevant in the sense of power or potential, but in a *taxonomic* sense:

NNL [New Natural Law] might, finally, appeal to the essentialism implied by the ordinary meaning of words. A dead man’s heart, which will never beat again, is still a heart, and his stomach is still a digestive organ. (So to speak! Don’t put lasagna in it). So the penis of a sterile man is still a reproductive organ. But the only aspect of reproductiveness relevant to NNL’s argument – the reproductive power of the organ – does not inhere in this particular organ. It is not reproductive in the sense of power or potential, even if it is a reproductive organ in the taxonomic sense. It is mysterious why its being taxonomically a reproductive organ should have any moral significance. (KOPPELMAN, 2004, p. 21-22)

This is an interesting point. At last, those natural lawyers elect a single “orientation” to our sex organs – procreation. This allows them to deny the morality of sex acts besides biological union and outside marriage – such as masturbation and the use of contraceptive methods.<sup>22</sup> Such acts disintegrate the very individual integrity by treating our bodily existence not as an end but as mean.

identical as well. Thus, the difference between infertile and fertile married couples is not a difference in what they do or in the act they perform. There is no difference in their voluntary conduct. Rather, it is a difference in an extrinsic condition that affects what may result from what they do” (LEE; GEORGE, 2014, p. 84).

- 21 That is the case of transsexual people. Gender/sex issues must not be confused with sexual orientation questions. Lesbian and gay people, by definition, are people who feel sexual and/or affective attraction to other women and men, respectively. A person who wants to change her/his sex is not, by definition, “lesbian or gay”, but transsexual.
- 22 Macedo thinks this point states the “political irrelevance” of the sexual morality proposed by natural law authors: “This fair-mindedness and broad sweep may also make the new natural law politically irrelevant. It supports only very broad public actions against sexual immorality in general: against divorce, contraception, all sex outside of marriage, and homosexuality. To reject natural law teachings on contraception, for example, is to jettison natural law ground for acting against homosexuality. This natural law philosophy cannot be of help to any but those few Americans who accept its extremely broad strictures. It provides no aid and comfort to the vast majority of those who would condemn homosexual activity while

Another criticism raised by Macedo relates to pleasure as an end in itself. Thus, for example, we do not eat only to satisfy our hunger, but to socialize or as a pleasurable activity as well – the same way we chew bubble gum without considering its nutritional value (MACEDO, 1995, p. 11-12). Therefore, restricting sex to reproductive biological union does not make sense. And sexual pleasure, regarded as one of the reasonable purposes of human action, can be experienced not only by heterosexuals but also by homosexual people.

I think this line of criticism forgets a fundamental point, already mentioned. For Finnis conceives marital sex (as biological union) as a self-evident basic good of human reasonableness. Sex can be pleasurable, but it will be immoral if it does not meet marriage's twofold point: procreation and conjugal friendship (FINNIS, 2011f p. 372). Therefore, it is through sex that we experience and actualize the good of marriage, and the very intelligibility of sex runs from the intelligibility of marriage. When we turn away this intelligibility, we seek an extrinsic good.

## 2.2 ARE THERE ANY BASIC GOODS MORE 'BASIC' THAN MARRIAGE? FINNIS' DOGMATISM

Thus, the biggest obstacle for same-sex marriage recognition on natural law grounds is Finnis' conception of biological union. Lesbian and gay couples cannot have reproductive sex. However, the central question is: considering that the biological union is one of the marriage's point, and thus is a self-evident, indemonstrable, undemonstrated, and incommensurable good, what would Finnis argue if I doubted his conception?

This kind of criticism has already been raised by other authors. The criticism consists on arguing that marriage cannot be a basic human good – for marriage is not self-evident as life or knowledge. This is claimed by Timothy Chappell (2001, p. 39), and Finnis' answer is particularly interesting.

Chappell argues marriage cannot be considered a basic good as friendship or knowledge, for marriage can be derived from other basic human goods as the very friendship, well-being, and even "physical pleasure" (CHAPPELL, 2001, p. 38-39). So, if basic human goods are underivable, and the good of marriage summarizes other basic goods, then Finnis' marriage conception is wrong – because marriage cannot be a basic good in its very meaning. However, Finnis insists that marriage is a unique and underived good, for the kind of friendship among spouses is not independent from reproductive sex. The *intrinsic good* of the biological union act (and the eventual nurturing of children) in a marital friendship ground

accepting the availability of divorce, contraception, and premarital sex" (MACEDO, 1995, p. 8). However, it is worth noting that natural law's position about sexual morality is the most coherent way to condemn homosexuality. Finnis does not care about what people think of using contraceptive methods – instead, natural law's position shows the incoherence of those people who believe condoms and birth control pills are defensible, but at the same time criticize homosexual people's sex and lifestyle.



does not depend on any explanation. Therefore, if marriage's twofold point is self-evident, so is marriage. In Finnis' conception, marriage's intrinsic value can be grasped by "clear exemplification" (FINNIS, 2011a, p. 9-10).

As seen, Finnis insists on conceptualizing marriage as a basic human good. But this way of seeing marriage cannot explain the controversies about this concept. Maybe Finnis would say, if I doubted his conception, that some propositions are self-evident only to the "relatively wise" (as Aquinas argued elsewhere).<sup>23</sup> Or that I still have not experienced the intrinsic value in marital friendship characterized by acts of reproductive kind – as the value of truth can only make sense for who experienced the connection between question and answer, who understands knowledge is characterized by correct answers to questions, and who perceived the good in obtaining correct answers. But on marriage, people who disagree with Finnis (like me and Chappell) could be considered by him as new-born children who "not had any such set of felt inclinations, memories, understandings, and (in short) experiences" about other basic goods (FINNIS, 2011d, p. 65).

This point highlights Finnis' dogmatism. Finnis' conception of marriage is unable to deal with controversies. Finnis makes use of what can be called the *incapacity thesis*, whose formulation is attributed to Crispin Wright by Ronald Dworkin in *Objectivity and Truth: You'd Better Believe It*:

Is it plausible to interpret the claim that abortion is objectively immoral, or that genocide is really wrong, or that the wickedness of terrorism is a moral fact, as including what we might call a general incapacity claim: that anyone who does not agree with this opinion is suffering from some cognitive impediment that explains his error? [...] People have no reason to claim that those who disagree with them must lack some information they have, or suffer from some intellectual incapacity or character defect, when they have no evidence of any such ignorance or incapacity or defect. That claim, in those circumstances, would be empty rhetoric, adding nothing to the original substantive claim. No one could think that his argument or position was improved by it. (DWORKIN, 1996, p. 10-11)

Therefore, Finnis can only reply my criticisms and the ones formulated by Chappell claiming that due to destiny or life contingencies we were "incapable" to experience marriage's good. And when we realize that Finnis engaged in a kind of incapacity thesis, the set of questions formulated by Stephen Macedo and Andrew Koppelman makes more sense.

23 "Aquinas's discussion begins by pointing out that while some propositions are self-evident to 'everyone', since everyone understands their terms, other propositions are self-evident only to 'the wise', since only the relatively wise (or learned) understand what they mean" (FINNIS, 2011d, p. 32).

In any case, we can grasp basic human goods, as rational ends of human action, by *experience*. I think Germain Grisez's interpretation of Aquinas' first principle of practical reason can provide a good account to defend sexuality, in its many forms, as a human inclination and a good which gives intelligibility to our actions. Thereby, we can see the weakness of Finnis' conception of biological union, and his misconceptions about homosexuality as well.

### 2.3 GERMAIN GRISEZ'S INTERPRETATION ON AQUINA'S FIRST PRINCIPLE OF PRACTICAL REASON

Thomas Aquinas' thought is one of the main influences on Finnis' natural law theory, but his work is difficult to understand – what can be noticed in the amount of different interpretations about it. Among these, Grisez's interpretation needs to be highlighted, especially his explanation about Aquina's first principle of practical reason. And it is worth noting that Grisez shares Finnis' marriage conception – actually, Finnis' conception is based on Grisez' considerations about marriage (BAMFORTH; RICHARDS, 2007, p. 94).

In his article *The First Principle of Practical Reason* (GRISEZ, 1965), Grisez argues that Aquinas conceives the first principle of practical reason by analogy with the first principle of theoretical reason as a self-evident and indemonstrable reason. But if theoretical reason relates to what our intellect can grasp, practical reason is directly related to our natural grasp that every action tends to an *end*. Theoretical reason is concerned about what “is”, and practical reason has a purposive nature – it corresponds to our mind “charting what is to be, not merely recording what already is” (GRISEZ, 1965, p. 175). Thus, “being” corresponds, at first place, to what we can grasp in a theoretical way – and its first principle is *the principle of contradiction or noncontradiction*: the same cannot both be and not be at the same time and in the same respect. Being is the intelligibility presupposition and foundation of theoretical reason idea (GRISEZ, 1965, p. 175). So, being is self-evident and naturally grasped by our own cognitive capacities.<sup>24</sup>

Just as being is for theoretical reason, so is *good* for practical reason. Because every action is directed to an end and Aquinas conceived this end as “good”. Thus, good is the primary intelligibility condition of practical reason – its intelligibility is what each thing tends toward (GRISEZ, 1965, p. 178). So, the first principle of practical reason can be expressed as “Good is to be done and pursued, and evil is to be avoided” (GRISEZ, 1965, p. 181). This reasoning states the good has the intelligibility of an end, and evil has the intelligibility of the contrary of an end.

These observations suggest that good is not a unique and indivisible end, for good includes anything that action can tend toward. And the ends of any human action which intends to

<sup>24</sup> “Being is the basic intelligibility; it represents our first discovery about anything we are to know – that is something to be known” (GRISEZ, 1965, p. 175).

be rational refers to the natural inclinations of human being. Therefore, the object of a human inclination is a *basic good*.

But how can we grasp these goods? What does make it possible for us to say that something corresponds to a human being's natural inclination? On Grisez's interpretation of Thomas Aquinas theory, *experience* is the only way to grasp basic goods. It can be said that experience is our contact with the world. It is our capacity to know the world and, through practical reason, to guide our actions toward the ends the very reason displays as possible ends to reach (GRISEZ, 1965, p. 180). Grasping these ends does not involve any derivation or demonstration, as we cannot derive or demonstrate the first principle of theoretical reason. As result, it also can be said that good has no moral connotation, for good is the intelligible end of any action. Good does not need to correspond to a "morally good action" – the basic goods transcend moral good and evil as the end transcends means and obstacles (GRISEZ, 1965, p. 183).

In any case, what I meant by analyzing Grisez's interpretation about the first principle of practical reason is demonstrate the centrality that human inclinations (and their experiencing) occupy in determining basic human goods. However, it is worth noting that not every inclination is relevant to identify a good – for human beings can have undesirable inclinations as violence and selfishness. But, while violence and selfishness appeal to emotional motivations, they cannot have the typical good intelligibility – as beneficial prospective states of affairs for any person.<sup>25</sup>

#### 2.4 SEXUALITY BEYOND MARRIAGE AND PARENTHOOD AS AN INDEPENDENT GOOD

If we grasp human basic goods by experience, then it is doubtful that marriage could be a basic good. Thus, critics as Timothy Chappell are correct when they suggest there are more fundamental goods than marriage displayed by human experience. Finnis, therefore, is mistaken in his interpretation about human inclinations which may refer to basic goods.

When we relate human basic goods to our natural inclinations, affirming their self-evidence, it does not follow that our interpretations cannot be criticized. So, I think the major problem with Finnis' conception is his implausible understanding about human sexuality.<sup>26</sup>

<sup>25</sup> "These are inclinations whose objects – however appealing to emotional motivations as source of some emotional satisfaction – lack the character of being intelligibly good, beneficial prospective states of affairs, making me and anyone lime me really better-off. The best interpretation of Aquinas's sentence is to take it as referring not to sub- or pre-rational inclinations of desire or aversion or inertia, but to the inclinations of the will (i.e. of intelligent appetite) which follow our understanding of such prospective states of affairs as intelligibly good, desirable" (FINNIS, 2011d, p. 449).

<sup>26</sup> It is worth noting that I am not disregarding cultural influences in the construction of our sexual desires. When talking about sexuality in this paper, I am referring only to our natural inclination to have sex (something that most animals have). Thus, I use the expressions *sexuality* and *sexuality manifestation* in this sense.

There is no reason to confine sexuality to reproductive acts, for many people can reasonably consider sex for the sake of pleasure. And few people will regard themselves “instrumentalized” when having sex in different ways. We see sexuality (in its different forms of manifestation – like heterosexual or homosexual sex) as an important element of our personality, a natural inclination of many people. When people have sex in complicity and affective ways, there is no reason to regard sex as an immoral act, even when it does not involve the “biological union”. Finnis is unable to prove his “instrumentalization” thesis, falling in an essentialism similar to the one criticized by Koppelman. After all, attributing moral meaning to the “biological union” itself is the same as deriving an “ought” from an “is”, infringing Hume’s Law in the most obvious way.

This means that, in fact, sex and procreation can be materially bound, but they are ontologically distinct. Sexual relations distinct in kind from Finnis’ “biological union” do not need to be merely hedonistic pursuits of pleasure. The different ways in that human sexuality can be expressed can be wholesome forms of intimacy between people – and this is the self-evident, indemonstrable, and underived circumstance that our experience shows us. Therefore, beyond marriage, sexuality and its various forms of manifestation can be thought as a human basic inclination in Finnisian grounds. Sex can be more than reproduction and still have value when linked to different forms of human flourishing.

Another problem in Finnis’ conception is the essential link that it draws between marriage and children’s nurturing. This link cannot be true because parenthood is a value independent of marriage. Nobody can be considered orphan if her mother widowed, for the bond between mother and child is independent of the parents’ marital bound. Thus, the meaning of parenthood can be grasped outside marriage, in an underived way. Of course, I do not mean that reproduction is not important. I am only saying that it has no conceptual connection with marriage. In fact, parenthood can be considered as a self-evident, indemonstrable, and undemonstrated good – the relation between mother or father and their children have intrinsic and independent value.

However, natural lawyers like Finnis are not willing to separate parenthood from marriage. In their vision, the conjugal friendship is intrinsically linked to sexual acts opened to procreation. When procreation occurs, man and woman share the responsibility for protecting and nurturing their children. But there is a significant difference between the practice of reproductive sex and the actual raising of children. We cannot infer any moral significance from the biological union, just because it is the sexual act procreative in kind. Even if we attribute moral significance to biological union, it is not clear why different sexual acts must be believed to be immoral or the “instrumentalization” of our bodies, considering the already mentioned complexity of human sexuality. That is why natural lawyers should recognize not only “married people” but “married people with children.” There is a clear conceptual distinction between marriage and parenthood. After all, if there is an intrinsic connection between marriage and actual parenthood, there would be no reason to recognize infertile couples’ marriage either.



Therefore, the fact that only heterosexual couples can procreate does not demonstrate, on conceptual grounds, why lesbian and gay marriages should not be recognized. At this point, a new argument can be proposed: recognizing same-sex marriage would impair the environment necessary for the flourishing of children and young people. Children have the “right” to have a father and a mother. For Patrick Lee and Robert George,

Where the nature of marriage is obscured and the culture of marriage is weakened, fewer young men and women marry, fewer view marriage as the proper context for sexual conduct and expression, and the number of children born outside marriage dramatically increases, and with it the number of children growing up outside intact families. But common sense and social science research indicate that generally, children fare best, on virtually every indicator of well-being, when raised by their married biological parents. (LEE; GEORGE, 2014, p. 109)

But how would same-sex marriage “obscures” or “weakens” the family constituted by man, woman and their children? There is no study relating the recognition of same-sex marriage and the rise in divorce rates, children abandonment or any of the questions mentioned by Patrick Lee and Robert George. There are only misleading presuppositions with no sociological or scientific evidence. Even if we concede that children fare best when raised by their married biological parents, that suggests the crucial responsibility of biological parents to nurture and educate their children – and nothing besides that. At best, this can be an argument against divorce, but not against same-sex marriage. However, no matter how difficult a divorce can be for the children involved, it is doubtful that the maintenance of a broken marriage, with no real bond between father and mother, will be in the best interests of children in medium or long term.

The real problem that must be addressed by natural lawyers is not same-sex marriage but the increasing individualism, with the correspondent loss of common responsibilities. Recognizing same-sex marriage, in fact, is a way to reaffirm the commitment and solidarity that must inform the bond between two people, regardless their sex, gender or sexual orientation. This is in the public interest. It is not only a question about love or affection or sentiments, but a question related to the common good.<sup>27</sup>

<sup>27</sup> William Eskridge maintains that the recognition of same-sex marriage involves the recognition of citizenship and have a potentially “civilizing effect.” In his book *The Case for Same-Sex Marriage* (1996), Eskridge argues: “When the state recognizes a couple’s right to marry, it offers a recognition of the couple’s citizenship, not a seal of approval for their lifestyle. Citizenship in a heterogeneous polity entails state tolerance of a variety of marriages, and states are not a bit choosy about who receives a marriage license. Convicted felons, divorced parents who refuse to pay child support, delinquent taxpayers, fascists, and communists – all receive marriage

Therefore, there is no necessary connection between sex, procreation, parenthood and marriage. Marriage cannot correspond to a human basic good. Human sexuality cannot be limited to biological union, and parenthood can be considered an independent good, unlike marriage.

## 2.5 SEXUALITY AND THE WORLD WE LIVE IN

Sexuality manifests itself in different ways. Besides heterosexuality, some people are naturally inclined to other sexual orientations, as homosexuality and bisexuality. Some people look not only for sexual relations, but also love, tenderness, and affection with people from distinct or the same sex as theirs. This is an empirical fact and needs to be adequately interpreted. Nothing in reason can be say that same-sex relationships are “wrong”, or that they “offend a basic human good” – simply because it makes no sense to demand that people behave differently from their own inclinations, as suggested by Grisez’s interpretation of Aquinas’ first principle of practical reason.<sup>28</sup> Thus, even if Grisez or Finnis come to distinct conclusions, these conclusions are mistaken due to basic presuppositions disclosed by human experience. Finnis’ marriage conception suffers from internal incoherence.

The idea of “bodily instrumentalization” is also incorrect. In most cases, when people have sex it does not seem that they are doing that for the sake of procreation. Infertile couples do not have sex with reproduction in mind. It is curious how the intentionality of married infertile couples is not considered, which renders clear Finnis’ essentialism on sexual matters. Nonetheless Finnis considers infertile married couples; they participate in marriage’s good in a marital friendship perspective. But homosexual couples can participate in this marital friendship as well. Thus, there is nothing evident when Finnis claims marital friendship is limited to a union between a man and a woman.

Even the *fides*’s idea, therefore, is misconceived by Finnis. As mentioned in the first section, Finnis argues *fides* does not make sense for homosexuals because there is no biological union in same-sex relationships. In his vision, the ideas of exclusivity and permanency are meaningless to lesbian and gay people. Finnis imagines the “central case” for same-sex relationships as “the anonymous bathhouse encounter, engaged in with a view to being repeated in another cubicle later that night” or “same-sex threesome or foursome between currently steady, committed friends” (FINNIS, 2011f, p. 381).

licenses from the state. [...] Gay people constitute virtually the only group in America whose members are not permitted to marry the partner they love. [...] Marriage in an urbanized society serves companionate, economic, and interpersonal goals that are independent of procreation, and the Supreme Court’s most recent marriage decision (involving prisoners) reflect that reality. Civilizing America does not require that all couples have children” (ESKRIDGE, 1996, p. 11-13).

28 As a natural inclination, homosexuality cannot be changed. This explains the failure of countless efforts for switching homosexual orientation.

So, in Finnis view, homosexuals have a predisposition to promiscuity.<sup>29</sup> But here experience also testifies against Finnis' perception. Although there are occasional differences among lesbian, gay, and heterosexual relationships, the fact is that there are a lot of similarities that Finnis seems unwilling to admit. Countless lesbian and gay couples stay together for years and have sexual and affective involvement, sharing a common life plan – sometimes “until death.” Thus, Finnis' mistake is an *empirical* one: there is *fides* (as marital friendship) between same-sex couples. Even if we analyze the “occasional differences” between heterosexual and homosexual couples we will notice that same-gender partnerships can be more egalitarian on the sharing of domestic labor (what must be cherished). This equal division of domestic labor is more difficult to see in traditional (or “patriarchal”) heterosexual couples, where the man works to sustain the family and the woman takes care of the children and the house.

Therefore, same-sex couples can have *fides*, and their sexual relations are not only a “hedonist pursuit of pleasure.” As infertile heterosexual couples, lesbian and gay couples do have sex to strengthen ties of intimacy and to deepen intense, closer, and committed relationships.<sup>30</sup> So Finnis' interpretation about human inclinations is a poor one, at least on our sexuality. As a result, he supports a wrong conception of marriage as a basic human good.

## CONCLUSION — TOWARDS SAME-SEX MARRIAGE RECOGNITION

If marriage is not a basic human good, then Finnis' position about the relation between government and sexuality should be reviewed.<sup>31</sup> For, in Finnis' view, while consensual and private

29 “Those who propound ‘gay’ ideology or theories of same-sex marriage or ‘sexual activity’ have no principled moral case to offer against (prudent or moderate) promiscuity, indeed the getting of orgasmic sexual pleasure in whatever friendly touch or welcoming orifice (human or otherwise) one may opportunely find it. [...] The world of same-sex partnerships (in the real world outside the artifice of debate) offers no genuine instantiations, equivalents, or counterparts to marriage, and so very few whole-hearted imitations” (FINNIS, 2011f, p. 387).

30 Such as Koppelman rightly said: “For at least some same-sex couples, sexual intercourse is valued, not merely as a pleasurable experience unintegrated with the rest of one’s life, but as an activity that is an important constituent of one of the primary relationships in one’s life, exactly as is the case with many heterosexual couples. In a sexual relationship, homosexual or heterosexual, the activity of pleasuring one another sexually may have the real and intended effect of constituting a relationship that is different and better – more intense, more committed, closer, and more enduring – *than it would be if the partners substituted, say, conversation*” (KOPPELMAN, 1997, p. 7).

31 Some clarification about Finnis' government conception is necessary here. Departing from his interpretation about Aquinas, Finnis differentiates the “State”, as political community (*communitas politica*) which exists among other states in an international order (as the *polis* in Aristotle’s thought or the *civitas* in Aquinas’

non-marital sex acts between adults should not be criminalized, the government should discriminate (i.e. “distinguish”) between heterosexual and homosexual relationships, discouraging the homosexual ones. This view encompasses what Finnis calls the *standard modern position*:<sup>32</sup> that government has a duty to ensure the public milieu where children, young people, and adults aspire to morally good lives, avoiding that citizens become “slaves to impulse and sensual gratification” (FINNIS, 2011b, p. 335).

Considering the aforementioned criticisms to Finnis’ vision about homosexuality, the so called standard modern position does not hold. Instead, it can be said that the “discrimination” of homosexuals is equivalent to stigmatization. This is seriously unjust and may cause irreparable damage to the mental health of lesbian and gay children and young people. Moreover, discrimination can be considered a determining factor for the increased rates of suicide among homosexuals (TRACY, 2016). Anyway, to justify same-sex marriage recognition on natural law’s foundations, we must understand how Finnis conceives the relation between government and common good.

In Finnis’ thought, the political community’s common good must be understood in a *limited* extent. Its equivalent is the *public good* (*bonum publicum*), as Aquinas conceived it: the specific elements of political common good are only goods and virtues featured in interpersonal relations. In a nutshell, the public good is equivalent to government’s guarantee of peace and justice (FINNIS, 1998, p. 226-227).

Therefore, the public good has, at least on Finnis conception, an *instrumental character*.<sup>33</sup> Finnis regards communication and cooperation as the main factors that constitute a community.

view), from “the State” as government, government agencies, or subject of public law (FINNIS, 1998, p. 219; FINNIS, 2013, p. 518). It is worth noting that is in relation to this last concept (government) that the issues of this paper are addressed.

- 32 “This ‘standard modern position’ has two limbs. On the one hand, the state is not authorized to, and does not, make it punishable offence for adult consenting persons to engage, in private, in immoral sexual acts (for example, homosexual acts). On the other hand, states do have the authority to discourage, say, homosexual conduct and ‘orientation’ (that is, overtly manifested active willingness to engage in homosexual conduct). And typically, though not universally, they do so. That is to say, they maintain various criminal and administrative laws and policies which have as part of their purpose the discouraging of such conduct. Many of these laws, regulations, and policies discriminate (that is, distinguish) between heterosexual and homosexual conduct adversely to the latter” (FINNIS, 2011b, p. 334).
- 33 Finnis is clear in that point in his essay *Limited Government*: “The government of political communities is rationally limited not only by constitutional law and by moral norms which limit every decent person’s deliberation and choice, but also by the inherent limits of its general justifying aim, purpose, or rationale. As Strauss observed in the passage I have recalled, that rationale is the common good of the political community. And that common good, as he did not observe, is (I shall argue) not basic, intrinsic or constitutive, but rather, instrumental” (FINNIS, 2011c, p. 87). It is worth noting that the common good treated in this paper



And when Finnis talks about the community's common good, he is talking about communication and cooperation addressed to a purpose which is considered by community members as valuable and pursued by them in similar ways (FINNIS, 2011c, p. 88). But in contrast to other communities whose common good instantiates a basic human good (such as friendships and families), the political community is necessary to the extent that it cooperates for an instrumental common good – political community is conceived as a necessary form of collaboration for participating in the goods identified as first principles of natural law. As a “complete community”, the political community is an association which aims to “favor, facilitate, and foster the realization by each individual of his or her personal development. (Remember: this personal development includes, as an integral element and not merely as a means or precondition, both individual self-direction and community with others in family, friendship, work, and play)” (FINNIS, 2011d, p. 147-148).

These considerations about the instrumentality of public good, plus the aforementioned view about human sexuality, lead us to government's duty in recognizing and protecting not only heterosexual couple, but also homosexual relationships. As argued, lesbian and gay people do love and constitute families, and the flourishing of their relationships depends on governmental action on a series of issues – as legal questions about spouses' rights and duties, inheritance etc. At last, recognition of same-sex marriage is a matter of justice and is in the interest of the public good. Therefore, the State must recognize same-sex relationships, which can be done by appealing to the foundations of natural law.

Finally, same-sex relationships should be recognized as marriage and not as merely “civil union”. Calling these relationships civil union is addressing the issue in a taxonomical way. If lesbian and gay couples need and demand the same rights assured to heterosexual marriage, then having two institutes with the same material and juridical features makes no sense. As Ronald Dworkin argued elsewhere, “whatever it is, if there are reasons for withholding the status [of marriage] from gay couples, then these must also be reasons why civil union is not an equivalent opportunity” (DWORKIN, 2006, p. 87).<sup>34</sup>

is limited – as political common good. The common good which appears in other sorts of communities, like friendships, families, and religious ones cannot be properly regarded as instrumental common goods.

- <sup>34</sup> Considering the values carried by marriage, Dworkin (2006, p. 86) also argues we cannot create an alternative institution as we cannot create a substitute for love. “The status of marriage is therefore a social resource of irreplaceable value to those whom it is offered; it enables two people together to create value in their lives that they could not create if that institution had never existed. We know that people of the same sex often love one another with the same passion as people of different sexes do. If we allow a heterosexual couple access to that wonderful resources but deny it to a homosexual couple, we make it possible for one pair but not the other to realize what they both believe to be an important value in their lives” (DWORKIN, 2006, p. 86-87).

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